IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1978

No. 78-859

ARTHUR V. GRASECK, JR.,
Plaintiff-Petitioner,

- against -

ANGELO MAUCERI, Individually and as Administrative Judge of the District Court of Suffolk County; et al.,
Defendants,

JOHN F. MIDDLEMISS, JR., Individually and as Attorney-in-Charge, Legal Aid Society of Suffolk County, New York,
Defendant-Respondent,

RALPH COSTELLO, Individually and as Attorney-in-Charge of the District Court Bureau of the Criminal Division of the Legal Aid Society of Suffolk County, New York,
Defendant,

LEGAL AID SOCIETY of Suffolk County, New York,
Defendant-Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES C. SCHULTZ
318 Terry Road
Hauppauge, New York 11787
ARTHUR V. GRASECK, JR.
Of Counsel
Attorneys for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 920 - September Term, 1977

(Argued March 31, 1978 Decided August 7, 1978)

Docket No. 77-7572

Arthur V. Graseck, Jr.,
Plaintiff-Appellant,

v.

Angelo Mauceri, individually and as Administrative Judge of the District Court of Suffolk County; Edward U. Green, Jr., individually and as a Judge of the District Court of Suffolk County,
Defendants,

John F. Middlemiss, Jr., individually and as Attorney-in-Charge, Legal Aid Society of Suffolk County, New York,
Defendant-Appellee,

Ralph Costello, individually and as Attorney-in-Charge of the District Court Bureau of the Criminal Division of the Legal Aid Society of Suffolk County, New York,
Defendant,

Legal Aid Society of Suffolk County, New York,
Defendant-Appellee.

Before FEINBERG, MANSFIELD and OAKES, Circuit Judges.

Appeal from dismissal of a 42 U.S.C. §1983 action by the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, holding inter alia that appellees had not acted under color of state law, thus depriving the court of subject matter jurisdiction.

Affirmed.

Frederick J. Damski, New York Civil Liberties Union, Smithtown, N.Y. (Harlon L. Dalton, Burt Neuborne, Arthur V. Graseck, Jr., of counsel), for Appellant.

Joseph P. Hoey, Brady, Tarpey, Hoey, P.C., New York, N.Y., for Appellees John F. Middlemiss, Jr., and Legal Aid Society of Suffolk County, New York.

OAKES, Circuit Judge:

This appeal requires us to determine whether conduct of a fundamentally private institution challenged on constitutional grounds constitutes "state action", one of the more slippery and troublesome areas of

civil rights litigation. Appellant brought suit under 42 U.S.C. §1983[1/] and its jurisdictional counterpart, 28 U.S.C. §1343, alleging that his discharge by the Legal Aid Society of Suffolk County, New York (the Society), violated the First, Sixth and Fourteenth Amendments. He sought a declaratory judgment, reinstatement and back pay. The United States District Court for the Eastern District of New York, Jacob Mishler, Chief

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1/ It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

Judge, dismissed the complaint[2] after a bench trial,[3] holding that appellees had not acted under color of state laws.[4] Graseck v. Mauceri, No. 74-C-1157 (E.D.N.Y.,

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2/ Defendants Middlemiss and Legal Aid were dismissed at this time. Prior to the trial before Chief Judge Mishler, the case was heard by Judge Weinstein, who at the close of that trial dismissed the complaint against defendants Mauceri, Green and Costello. Pursuant to the remaining defendants' request, Judge Weinstein then recused himself. Thereafter the case was reassigned to Chief Judge Mishler. Appellant's appeal is limited to the dismissal of Middlemiss and Legal Aid.

3/ The case was tried de novo before Chief Judge Mishler, although the transcript from the earlier trial, see note 1 supra, was admitted into evidence.

4/ The district court alternatively concluded that the discharge did not abridge any constitutional guarantee. It is unnecessary to address this holding.

dated Oct. 28, 1977). Since we agree that the Society's discharge of appellant did not constitute state action,[5] we affirm.

I. FACTS

Arthur Graseck began working for Legal Aid as a staff attorney on July 12, 1971, and was assigned to the District Court Bureau of the Criminal Division in Hauppauge, Long Island. Following a number of incidents detailed below, he was discharged by his supervisor, John Middlemiss,[6] on October 13, 1972, after he refused to resign.[7] On

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5/ The "under color of state law" prerequisite of §1983 is synonymous with the state action requirement of the Fourteenth Amendment as first explicated in Civil Rights Cases, 109 U.S. 3 (1883). Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966). The terms are used interchangeably throughout our discussion.

6/ Middlemiss was attorney-in-charge of Suffolk Legal Aid during Graseck's employment.

7/ Middlemiss discussed the reasons for the discharge in a 45-minute meeting with appellant. He dismissed Graseck when it became apparent that appellant could not adequately explain the numerous

November 15, the Personnel Committee of the Society held a hearing to review appellant's termination,[8] particularly appellant's charge that judicial pressure provoked the decision.[9] The committee upheld the dismissal, as did the Society's board of directors on January 24, 1973.[10]

7/ Cont.

incidents culminating in the dismissal. Prior to the meeting, Middlemiss and Ralph Costello, attorney-in-charge of the District Court Bureau for the last six to eight weeks of appellant's employment, had agreed upon the need to dismiss Graseck.

8/ The meeting was divided into three stages. The first was a session open to the public during which civil rights and social service organizations and former clients of appellant spoke on his behalf. A closed session was then conducted with the committee's five members, Costello, Middlemiss, appellant and Thomas Boyle, attorney-in-charge of the District Court Bureau during most of appellant's employment. In this private meeting the four attorneys presented their positions, appellant submitted exhibits, and Boyle spoke on Graseck's behalf.

9/ The vote was four to one.

The district court found that appellant was discharged due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continual absence from assigned areas. In other words, Graseck was asked to resign because his conduct over the course of the year disrupted the efficient operation of the Society. These were substantially the reasons proffered by Middlemiss and Costello.[11] The events which culminated in the dismissal must be explored at some length in order fully to appreciate Chief Judge Mishler's conclusion that the discharge, far from being a reaction to judicial pressure resulted from the independent managerial decision of the Society.

10/ Appellant was neither informed of nor present at this meeting.

11/ He replaced Thomas Boyle as attorney-in-charge of the District Court Bureau after Boyle transferred to the Riverhead office.

According to the district court, Graseck's inability to work with other staff attorneys stemmed from his repeated interference with their clients. For example, a heated argument between appellant and a Ms. Mottenburg ensued after he took her client's file without informing her. When the case was called, no one answered and a bench warrant was issued for the client's arrest. Similarly, on at least three other occasions, without consulting assigned counsel, he induced their clients either not to plead guilty after a contrary decision had been made or to withdraw their pleas. This conduct, however much it may have aided the individual client, obviously created tension and friction between appellant and his co-workers.

The district court referred to three incidents to support its finding that "(p)laintiff's overwhelming desire to protect and defend his assigned clients often led him to exercise poor judgment and to deviate from established standards of conduct. This

weakness particularly emerged in his relations with the judges of the District Court." Graseck v. Mauceri, supra, No. 74-C-1157, at 8. Two of the incidents, involving confrontations with state judges, form the basis of appellant's assertion that his dismissal directly resulted from the Society's inability to withstand the pressure imposed by these judges, and hence was "state action." The first occurred in February, 1972. After a presiding judge in a criminal trial denied appellant's request for production of certain police records, Judge Mauceri, the administrative judge of the district court, denied a subpoena duces tecum. Appellant then unsuccessfully presented the subpoena to a third judge, without disclosing the previous denials. Thereafter Graseck, again without revealing the previous denials, asked another staff attorney to submit the subpoena to a fourth judge, who signed the subpoena. Upon discovering what he considered to be improper

conduct, Judge Mauceri suggested to Thomas Boyle, the attorney-in-charge of the District Court Burearu at that time, that Graseck be transferred from the Bureau. Boyle consulted with Middlemiss, and they agreed that a transfer "would constitute a submission by the Society to the authority of the court in a matter which solely concerned the Society." Id. at 9-10. Accordingly, they did not succumb to the judge's suggestion. Shortly thereafter, Judge Mauceri explained in a transcribed meeting with Boyle and appellant:

> As far as your practice, I don't want you to limit yourself or your ability to defend the clients the way you see fit. I don't intend to do that but you have to do it within the purview of the rules and regulations of ethics. Every lawyer is bound by it, not only you but everyone, whether it be a private attorney or one working for the State as you are.

The judge warned appellant that he would refer the matter to the Character Committee of the Bar Association if Graseck engaged in similar conduct in the future. He ended the

meeting on an optimistic note, however, stating: "I hope this is the end of it".

The second run-in with the judiciary occurred in late September, 1972, when appellant moved to dismiss a misdemeanor case for failure to prosecute. In the affirmation accompanying the motion, he accused Judge Green of being an agent of the district attorney, endeavoring to accommodate the People's desires at the cost of the defendant's constitutional and statutory rights. When the judge learned of the charges he requested a conference with appellant and Costello.[12/] There is conflicting testimony as to the message Judge Green conveyed at the meeting. According to appellant, the judge banned him from further appearances in his courtroom. Judge Green recalled having instructed

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12/ After the meeting, Costello criticized appellant for the language used in the affirmation and reported the incident to Middlemiss.

appellant to ask for the former's disqualification in any future case in which appellant feared bias. That Graseck did appear before the judge subsequent to the conference was supported by Judge Green's testimony and documentary evidence. Judge Green also testified that he never intended to prompt Graseck's dismissal by requesting the conference. The district court accepted Judge Green's version of the discussion. The evidence supports this finding.

The third episode which, according to the district court, revealed appellant's poor judgment and was a factor underlying Middlemiss's decision to seek Graseck's dismissal, involved Graseck's attempt to bring and Article 78 proceeding against a trial judge. His purpose was to compel the judge to indicate in the records that a trial had been adjourned because of the prosecutor's lack of readiness rather than court congestion. After Graseck filed the papers at the Supreme Court in

Riverhead, and an official there informed Middlemiss of Graseck's action, Middlemiss ordered appellant to stop pursuit of the action and to return to the district court. Evidently, Middlemiss was irritated by Graseck's recurring crusades for his clients which often precluded his availability for more routine matters.

Chief Judge Mishler found three additional incidents revelatory of appellant's inability to follow established rules. The most critical, for purposes of deciding the state action issue, involved a second confrontation with Judge Mauceri. On October 12, 1972, appellant left a ball point pen with a client during a visit in the holding pen. Upon discovery, a guard prohibited appellant from entering the holding pen and informed Judge Mauceri of the security considerations involved. Whether the security personnel had previously given instructions never to leave such instruments with detainees because of their potential use

as weapons is in dispute. Judge Mauceri issued an order barring Graseck from entering the holding pen, telephoned Middlemiss to apprise him of the order and then sent Middlemiss written confirmation of his decision.[13/] What was said during the telephone conversation is also disputed. Boyle testified[14/] that Middlemiss told him that Mauceri had stated, "You have got to get this guy out of my court." Trial Transcript at 1-70. Middlemiss and Mauceri denied that

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13/ The letter stated:

> One of your attorneys, Mr. Grasseck sic , committed a very serious offense this morning while visiting a prisoner in the cellblock without the knowledge of the security man. He gave to that prisoner a fountain pen, which could be used as a weapon. This is a serious breach of secuirty and I have issued an order today barring Mr. Grasseck from the cellblock area.
>
> I think that your office should advise this man of the seriousness of his action so that he does not repeat it at any other location.

Letter from Administrative Judge Angelo Mauceri to John F. Middlemiss, Jr. (Oct. 12, 1972).

any such statement was made. Judge Mauceri also denied having intended to pressure the Society into dismissing appellant or even having contemplated the possibility of dismissal.[15]

Judge Mauceri was not the only person who objected to appellant's practices. Appellant was prohibited by an assistant district attorney from entering the district attorney's office without accompaniment after Graseck was discovered one day rummaging through the office's files after 5:00 p.m. And Middlemiss revealed that appellant had loaned to outsiders minutes of Legal Aid cases on several occasions without the requisite approval.

14/ Boyle resigned from Suffolk Legal Aid in protest over Graseck's dismissal.

15/ To Middlemiss's knowledge, Graseck's was the first and only dismissal of a staff attorney in the Society's history.

The district court lastly found that complaints received by Costello almost on a daily basis about Graseck's absence from his assigned part played a role in the Society's decision to seek his removal. Although these continual absences were caused by appellant's good faith attempts to aid his clients, they disrupted the organizational framework of the Society and often shifted appellant's workload onto the shoulders of his already overburdened colleagues.

The district court's findings regarding the events underlying the dismissal decision are not clearly erroneous and find support in the record. The question presented for review then, simply stated, is whether the judicial criticism of appellant together with the working relationship between the Society and the state judges constituted sufficient state involvement in the dismissal as to constitute "state action."

II. DISCUSSION

A prerequisite for any relief under Section 1983, of course, is that the defendant have acted under color of state law. See notes 1 & 5 supra. There is no dispute over the Society's fundamentally private nature.[16/] Nevertheless, appellant asserts that the dismissal amounted to state action because (1) the private entity conspired with state officials to perform an unconstitutional act.

16/ The institution exists independent of any state or local regulatory authority. It is a private membership corporation organized under New York corporation law. Pursuant to its bylaws, a board of directors elected by the Society's general members manages the organization. No member of the board is a public official. The attorney-in-charge has authority for the supervision of the branch offices, including the hiring and firing of attorneys, subject to the control of the board.

The Society provides legal services to indigent criminal defendants under a contract with the County of Suffolk, renewed on an annual basis. This contract was made pursuant to New York state law which authorizes the County to utilize "public defender" or "private legal aid" systems. It provides in pertinent part:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Price, 383 U.S. 787, 794 (1966), and (2) the State, through its judicial officers' conduct and its administrative and financial support of the Society,

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16/ Cont.

> The governing body of each county . . . shall place in operation throughout the county. . .a plan for providing counsel to persons charged with a crime. . .who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:
>
> 2. (R)epresentation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel. . .
>
> 3. Representation by counsel furnished pursuant to a plan of a bar association. . .
>
> 4. Representation according to a plan containing a combination of any of the foregoing. . . .

N.Y. County Law, art. 18-B, §722 (McKinney Supp. 1977-78) (emphasis added).

"significantly involved itself" in the administration of the private institution, see Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967), and developed a "symbiotic relationship" with the private organization. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

We believe that Lefcourt v. Legal Aid Society, 445 F. 2d 1150 (2d Cir. 1971), is dispositive of most of the theories advanced by appellant and that the additional facts extant in this case do not compel a contrary result. In Lefcourt, a panel of this court held that the dismissal of a legal aid attorney by the Legal Aid Society of the City of New York was not performed under color of state law, notwithstanding the receipt of substantial government funds by the Society.[17/] The lack

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17/ Chief Judge Mishler was aware of the more rigorous scrutiny imposed when challenged activity does not involve

of governmental control over or interference with the Society's affairs was deemed

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17/ Cont.

racial discrimination. See Lefcourt v. Legal Aid Soc'y, 445 F. 2d 1150, 1155 n.6 (2d Cir. 1971). We agree that the less stringent state action standard utilized in racial discrimination cases is inapplicable here. Schlein v. Milford Hosp., Inc., 561 F. 2d 427, 428 n.5 (2d Cir. 1977) (per curiam); Taylor v. Consol. Edison Co. of New York, Inc., 552 F. 2d 39, 42-43 (2d Cir. 1977); Jackson v. Statler Foundation, 496 F. 2d 623, 629, 635 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975). But see, e.g., Downs v. Sawtelle, No. 77-1260, slip op. at 7-8 n.5 (1st Cir., Mar. 30, 1978) (urging that "fundamental rights" should receive identical scrutiny).

pivotal.[18] Id. at 1155.

The similarities between Lefcourt and the facts before us are, not surprisingly, striking. The bylaws of both societies are almost identical, see note 16 supra, their respective

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18/ The court in Lefcourt also rejected the public function theory of state action holding:

> Although the Society by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume, its history constitution, by-laws, organization and management definitely establish that it is a private institution in no manner under State of City sypervision or control.

Lefcourt v. Legal Aid Soc'y, supra, 445 F. 2d at 1156-57 (footnote omitted). See also Flag Bros., Inc. v. Brooks, 46 U.S.L.W. 4438, 4440-42 (U.S. May 15, 1978) (rejecting public function doctrine of state action where challenged private conduct is not an exclusive prerogative of the State); but see id. at 4442 (refusing to consider whether state action is implicated by delegation to private parties of functions traditionally more exclusive than dispute resolution, such as education).

contracts were made pursuant to the same New York law requiring the State to implement a plan for furnishing counsel to indigent defendants, see Lefcourt v. Legal Aid Society, supra, 445 F. 2d at 1155, they both receive substantial government funding (although the Society in Lefcourt evidently received some funds for its criminal division from private sources,[19/] they are both housed in government buildings, and, most importantly, there is no formal mechanism through which any government entity can exercise control or supervision over the internal operations of the societies. See id.

Thus far, Lefcourt supports if not compels a finding of no state action. Its reasoning applies with equal force to the instant facts:

19/ The criminal division of the Society in the case before us is entirely funded by the Suffolk County Legislature.

> (I)t cannot be said that the Society acts under color of State law by virtue of the financial and other benefits (20/) which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs.

Id. (footnote omitted).

The crucial question is whether the actions of Judges Mauceri and Green, and in particular

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20/ Appellant lists as additional indicia of state action Judge Mauceri's request for funds for the Society in his 1971 annual address to the County Legislature, his having provided the Society with a Spanish-speaking interpreter, and his adjustment of certain court procedures to accomodate the Society when its case-load became excessive. Such minimal courtesies to ensure the continued efficient operation of the Society and concomitantly of the criminal courts are hardly grounds for distinguishing this case from Lefcourt. Moreover, as is true of the factors analogous to both cases, there is no relationship or nexus between state involvement of this sort and the challenged dismissal. See note 22 infra.

their communications with Graseck's supervisors, provide sufficient invclvement in the discharge to distinguish Lefcourt and to render the conduct of the Society that of the State. Since the judges in no sense actively participated in the decision-making process itself, it must be determined whether they encouraged or coerced the dismissal, see, e.g., Flag Brothers, Inc. v. Brooks, 46 U.S.L.W. 4438, 4442 (U.S. May 15, 1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356 n.15, 357 & n.17 (1974); Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 173, 176-77; Schlein v. Milford Hospital, Inc., 561 F. 2d 427, 428-29 (2d Cir. 1977) (per curiam); Taylor v. Consolidated Edison Co. of New York, Inc., 552 F. 2d 39, 43, 46 (2d Cir. 1977); Note, State Action: Theories for Applying Constitutional Restrictions to Private Activities, 74 Colum. L. Rev. 656, 680, 682-83 (1974). And even if that question were answered affirmatively, the question would

remain whether the discharge was in response to their requests. See Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1136-38, 1140 (C.D. Cal. 1976) (especially discussion of prior state action cases); cf. Herrmann v. Moore, No. 77-6184, slip op. 3005, at 3011-1 (2d Cir. May 10, 1978) (no "deprivation" under 42 U.S.C. §1983 where trial continued despite alleged attempts by state court judge to impede the action).

Appellant asserts that his discharge was in direct response to the judicial pressure imposed on the Society by Judges Green and Mauceri. We are unpersuaded by Graseck's argument, as were the courts below. Judge Weinstein, in dismissing the complaint against the state judges, see notes 2-3 supra, found totally lacking any evidence that they encouraged or even desired the discharge:

> There isn't the slightest direct evidence that these judges asked for the resignation or firing of this plaintiff or that they desired it. . . I don't see how there's any basis for liability here in the judges. . .
>
> There simply has been no case made out. The only thing we have is the hearsay and surmise of the plaintiff, which certainly doesn't suffice.

Trial Transcript at 268 (Weinstein trial) (Nov. 26, 1976).[21/] Chief Judge Mishler concluded in a similar vein that "their participation was chiefly confined to criticizing

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21/ We note that at the conclusion of the initial trial Judge Weinstein found the evidence too indirect to justify retention of the state judges as parties. He was, however, not discussing their involvement with the Society for purposes of establishing state action. In fact, Judge Weinstein denied a motion to dismiss for lack of jurisdiction, finding state action from the close working relationship between the District Court of Suffolk County and the Society. Trial Transcript at 269 (Weinstein trial) (Nov. 26, 1976).

plaintiff for his errors of judgment and his misdeeds, and to reporting these incidents to his superiors," Graseck v. Mauceri, supra, No. 74-C1157, at 24; and that "the decision to dismiss (appellant) resulted from the independent determination of the Society and was grounded upon (appellant's) entire course of conduct during the twelve month period of his employment at the district Court Bureau." Id. at 25 (emphasis in original).

State involvement in any manner in the activities of a private institution does not necessarily establish state action. Its existence depends on "whether there is a sufficiently close nexus between the State and the challenged action of the(private) entity so that the action of the latter may be fairly treated as that of the State itself". Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 351;[22/] Moose Lodge No. 107 v. Irvis,

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22/ The Supreme Court has not yet addressed the extent to which the

supra, 407 U.S. at 176. In the typical case, the question posed is relatively simple: was the state "involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff

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22/ Cont.

> "symbiotic relationship" analysis of Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), survives Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). We have held that the relationship beteeen the state and a private entity may be so extensive that the actions of the ostensibly private institution will fall within the ambit of state action, even in the absence of direct state involvement in the challenged activity. Holodnak v. Avco Corp., 514 F. 2d 285, 288 (2d Cir.), cert. denied, 423 U.S. 892 (1975). Accord, e.g., Downs v. Sawtelle, supra, No. 77-1260, at 12-13; Chalfant v. Wilmington Inst., No. 76-2132, slip op. at 10-13 (3rd Cir. Feb. 27, 1978) (en banc); Braden v. Univ. of Pittsburgh, 552 F. 2d 948, 956-58 (3rd Cir. 1977) (en banc); Weise v. Syracuse Univ., 522 F. 2d 397, 407 n.12 (2d Cir. 1975). Not unmindful of the close working relationship here, we believe that the absence of governmental participation, let alone of "substantial" participation, in the Society's general management and internal operations precludes a finding in this case of the degree of pervasive

but with the activity that caused the injury(?)" Powe v. Miles, 407 F. 2d 73, 81 (2d Cir. 1968) (emphasis added). The instant case presents a slightly different inquiry, however, because the conflicts between Graseck and the judges undisputedly were among the factors which prompted the Society's decision to discharge appellant. Thus, there is an attenuated causal connection between the conduct of the judges and the action taken by the Society that normally does not exist in the regulatory context. It still must be determined, however,

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22/ Cont.

interdependence or partnership contemplated by Burton. See Braden v. Univ. of Pittsburgh, supra, 552 F. 2d at 959-61; Jackson v. Statler Foundation, supra, 496 F. 2d at 635; cf. Schlein v. Milford Hosp., Inc., supra, 561 F. 2d at 428-29 (holding no state action because of absence of a nexus without discussing symbiotic relationship analysis, where the state played no part in either formulating hiring procedures of hospital or applying them to appellant).

whether the state judges placed their "imprimatur" on the Society's conduct, Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 357, by expressing their unhappiness and requesting the Society to control its attorney. In the words of the Supreme Court, "where the (state) has not put its own weight on the side of the proposed practice by ordering it, . . .a practice initiated by the(private entity) and approved by the (state is not transmuted) into 'state action.'" Id. at 357. But where it has done so, Jackson seems to imply, there perhaps may be state action. Cf. Note, supra, 74 Colum. L. Rev. at 656, 582 n. 166, 683 (relying on Second Circuit cases for the proposition that state action "does not require that government command, regulate or influence the challenged activity. It is enough that government influence or encourage private persons to perform functions or implement policies in the course of which a challenged activity

occurred." (footnote omitted)).

Our review of the three incidents deemed crucial by appellant convinces us that the limited nature of the judges' conduct complained of precludes a finding of state action. The chain of events following Judge Mauceri's communications after the subpoena incident is quite revelatory of his lack of influence over both the Society's internal operations in general and its ultimate decision to discharge Graseck. Boyle and Middlemiss adamantly refused to transfer appellant, contrary to the judge's suggestion. From the transcript of the subsequent meeting, it is apparent that not only had Judge Mauceri by this time acquiesced in the Society's decision, but he was hopeful of a good working relationship in the future. The judge did not again have contact with the Society concerning Graseck until the pen incident, some eight months later. Thus, the evidence refutes the notion that Graseck's discharge

was in response to Judge Mauceri's transfer suggestion. Moreover, there is no indication that the judge directly or indirectly encouraged the dismissal simply by bringing to the attention of the Society with the aim of arresting similar incidents conduct of one of its staff thought by the judge to be improper. See text accompanying notes 23-24 infra.

Appellant's attempt to attribute his dismissal to prompting by Judge Green fares no better. There is no evidence that the judge ever requested, suggested or desired the Society's course of action. He was solely controlling the administration of his court. We do not doubt that the friction between the judge and appellant could have impeded appellant's ability meaningfully to function for the Society; obviously, the Society would not have discounted this concern when it reviewed appellant's past and future utility. But much more in the way of state

involvement is necessary to characterize private conduct as that of the State. "(T)he state action, not the private action, must be the subject of the complaint." Powe v. Miles, supra, 407 F. 2d at 81. See Taylor v. Consolidated Edison Co. of New York, Inc., supra, 552 F. 2d at 43 ("The relationship of the state's involvement to the conduct forming the basis of the constitutional claim is likewise of prime importance. Where the 'private'party is engaged in the alleged deprivation at the state's express direction, the actor may well be subjected to constitutional limitations."). We are unwilling to infer judicial fostering of the dismissal simply because a judicial officer happened to be involved in one of numerous incidents which reflected appellant's inability to work compatibly with the people around him. See text accompanying notes 23-24 infra.

The lack of state direction is further elucidated by the circumstances surrounding

Judge Mauceri's order barring Graseck from the holding pen. Undisputedly, appellant's diminished utility to the Society resulting from the order was one reason for his dismissal.[23/] We reiterate, however, that it is not the effect alone that government conduct has on private actions which establishes the governmental character of the private action. Rather, it is the degree of government influence and control over the private entity, and in particular over the decision itself that is determinative.[24/] Judge Mauceri's

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23/ Middlemiss testified that his decision to discharge appellant crystalized after the pen incident not only because of Graseck's impaired utility to the Society stemming from Judge Mauceri's order, but also because of the extreme impropriety and seriousness of Graseck's conduct.

24/ Appellant's reliance on Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), is unavailing. Judge Ferguson there stated, after a thorough review of the state action doctrine, that mere governmental encouragement of a programming policy ultimately adopted

order was made to promote the orderly functioning of the criminal court system pursuant to his duties as administrative judge. We refuse to read into this action any other motive, nor could we do so even if willing, given our appellate role. Middlemiss, after discussion with Costello, determined that appellant's discharge was in the best interests of the Society. That the decision was partially based on prior clashes with two state court judges and a desire to promote a good working relationship with these judges (as well as

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24/ Cont.

by the major networks would not suffice to invoke the doctrine. 423 F. Supp. at 1135-40. The court found state action extant due to the FCC's exertion of significant pressure to adopt the policy accompanied by threats of severe sanctions. Id. at 140-43. See Kuczo v. Western Connecticut Broadcasting Co., 566 F. 2d 384, 387-88 (2d Cir. 1977). In other words, the private decision was not an independent one. Here, by contrast, evidence of active encouragement is meager; evidence of pressure to discharge appellant is totally lacking.

between the staff attorneys) does not shift responsibility for an internal decision generated by an autonomous organization into state action. To characterize the one disputed statement of Judge Mauceri, "to get this guy out of my court," see text accompanying notes 14-15 supra, as having significantly influenced the dismissal distorts the significance of the statement, made in a moment of anger, as well as the record, brimming with additional incidents, out of all proportion. Judge Mauceri's expression of his displeasure with appellant's behavior was a feeling evidently not unique to the judges. Given the continuing working relationship between the judges and the Society, his attempt to minimize strain through discussion is perfectly understandable. In the final analysis we must, in the light of the district court's findings, view Judge Mauceri's possible request for appellant's removal as no more than an unfortunate expression of outrage which the

Society never interpreted as a demand for dismissal.

In sum, we agree with the district court that the Society initiated the dismissal based on its own independent evaluation of its needs, rather than at the behest of the state judges.[25/] See Taylor v. Consolidated Edison Co. of New York, Inc., supra, 552 F. 2d at 45. Official "involvement," if it can even be characterized as such, merely amounted to the judges' contribution of material facts, their reactions thereto, and their exercise of supervisory powers over

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25/ To the extent that the conspiracy theory of state action utilized in Adickes v. S.H.Kress & Co., supra, is distinguishable from the coercion or encouragement theory discussed above, compare Writers Guild of America, West, Inc. v. FCC, supra, 423 F. Supp. at 1138-38 n. 129 (noting a possible difference), with Flag Bros., Inc. v. Brooks, supra, 46 U.S.L.W. at 4442 (implying no difference), it is inapplicable here. The state judges' lack of encouragement to dismiss appellant and lack of intent in this regard belie the existence of a conspiracy.

their courts. There being no official intrusion into the personnel policies of the Society, its management decision may not be attributed to the State.

Judgment affirmed.

App. B1(a)

MEMORANDUM OF DECISION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

ARTHUR V. GRASECK, JR.,

Plaintiff,

-against-

ANGELO MAUCERI, individually and as Administrative Judge of the District Court of Suffolk County; EDWARD U. GREEN, JR., individually and as a Judge of the District Court of Suffolk County; JOHN F. MIDDLEMISS, JR., individually and as Attorny-in-Charge, Legal Aid Society of Suffolk County, New York; RAPLH COSTELLO, individually and as Attorny-in-Charge of the District Court Bureau of the Criminal Division of the Legal Aid Society of Suffolk County, New York; LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK,

Defendants.

No. 74-C-1157

----------X

MEMORANDUM OF DECISION AND ORDER

----------X

RESERVE INSURANCE COMPANY,

Plaintiff,

-against-

ANGELO MAUCERI, individually, etc., EDWARD U. GREEN, JR., individually, etc., JOHN F. MIDDLEMISS, JR., individually, etc., RALPH COSTELLO, individually, etc., LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK and ARTHUR V. GRASECK,

Defendants.

----------X

Memorandum of Decision and Order (Consolidated Actions)

No. 74-C-1559

October 28, 1977

A P P E A R A N C E S :

Attorneys for Plaintiff Graseck

LEGAL ACTION CENTER OF THE CITY OF
NEW YORK, INC.
271 Madison Avenue
New York, New York 10016
by: DEBORAH M. GREENBERG, ESQ. and
HARLON L. DALTON, ESQ.-Of Counsel
- and -
BURT NEUBORNE, ESQ.
40 Washington Square South
New York, New York 10003

Attorneys for Plaintiff Reserve Insurance Co.

BOWER AND GARDNER, ESQS.
415 Madison Avenue
New York, New York 10017
by: RICHARD T. WOLF, ESQ.-Of Counsel

Attorneys for Defendants John F. Middlemiss, Jr., Ralph Costello and Legal Aid Society of Suffolk County, New York

BRADY, TARPEY, HOEY, P.C.
84 William Street
New York, New York 10038
by: JOSEPH P. HOEY, ESQ.-Of Counsel

MISHLER, CH. J.

Plaintiff brings this action to redress his alleged improper discharge as a staff attorney with the Legal Aid Society of Suffolk County, New York ("the Society").

He contends that defendants, acting under color of state law, terminated his employment in violation of (i) substantive rights protected by the first, sixth and fourteenth amendments to the United States Constitution and (ii) procedural rights protected by the fourteenth amendment to the United States Constitution. More specifically, plaintiff argues that his dismissal was prompted by the exercise of free speech and the assertion of his clients' rights to a fair trial and to effective legal representation. Plaintiff also contends that the reasons proferred by defendants for his termination are unconstitutionally arbitrary and that the dismissal was motivated by judicial pressure. Finally, plaintiff asserts that defendants' failure to afford him written notice of the basis of his dismissal and to factually investigate these grounds violated the due process clause of the fourteenth amendment.

Plaintiff bases his claim upon 42 U.S.C. §1983 [1] and upon the first, sixth and fourteenth amendments to the United States Constitution. Thus, jurisdiction is conferred by the federal question statute, 28 U.S.C. §1331(a), and 28 U.S.C. §1343(3) and (4). Plaintiff seeks a declaratory judgment stating that his dismissal was unconstitutional; an order directing his reinstatement with the Society; and back pay commencing from the date of his discharge.

/1 42 U.S.C. §1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Defendants take the position that the Society is a private entity whose actions were not taken under color of state law and therefore is not subject to jurisdiction under 42 U.S.C. §1983. Furthermore, defendants argue that even if the Society is deemed an instrumentality of the state (i) they did not deprive plaintiff of any constitutional rights and (ii) plaintiff was an employee dischargeable at will who was dismissed for good cause.

The case was tried before the undersigned.[/2]

/2 Approximately six months before the case was heard by this court, the action was fully tried by Judge Weinstein. At the close of trial, Judge Weinstein granted motions to dismiss by defendants Mauceri, Green and Costello; denied similar motions by defendants Middlemiss and the Society; and reserved decision on all other issues. Thereafter, Judge Weinstein recused himself and the case was reassigned to the undersigned. At retrial, the parties agreed to incorporate the transcripts of the Weinstein trial as evidence and were given the opportunity to call any witnesses for additional examination.

FINDINGS OF FACT

On July 12, 1971, plaintiff began working for the Society as a staff attorney in its Criminal Division. In October, he was assigned to the District Court Bureau in Hauppauge, Long Island,[3] where he remained until his dismissal approximately one year later. E. Thomas Boyle, Attorney-in-Charge of the District Court Bureau from October 1971 to August 1972, served as plaintiff's immediate supervisor. In August 1972, Ralph Costello replaced Boyle as Attorney-in-Charge of the District Court Bureau and thus supervised plaintiff during the final two months of his

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[3] The Criminal Division of the Society has two offices, one in Hauppauge where the District Court is located (this office is referred to as the District Court Bureau) and one in Riverhead where the County Court and the Supreme Court are located. The District Court Bureau provides representation to indigents prosecuted in the District Court on misdemeanor charges and also provides representation to indigents at felony examinations. The District Court Bureau is physically situated in the courthouse itself.

employment.

On October 13, 1972, defendant John F. Middlemiss, Jr., Attorney-in-Charge of the Society, met with plaintiff and Costello. Defendant Middlemiss asked plaintiff to resign, setting forth the grounds for the request. When plaintiff refused to resign -- stating that he needed the weekend to consider it -- defendant Middlemiss dismissed him.

A few days later, Boyle met with defendant Middlemiss to protest plaintiff's discharge and to urge his reinstatement. When defendant Middlemiss declined to rehire plaintiff, Boyle resigned. In his letter of resignation dated October 31, 1972, Boyle accused the Society of discharging plaintiff for incurring judicial disfavor. He stated that "...Mr. Graseck was fired as a result of certain pressures brought to bear by the administrative judge of the District Court, Angelo Mauceri, J.D.D., and that Mr. Graseck's firing was

totally unwarranted under the circumstances. . ." (Plaintiff's Exhibit 2, p.1).

On November 15, the Personnel Committee of the Society held a hearing to review plaintiff's termination, particularly the charge levelled against the Society by plaintiff and Boyle that judicial pressure provoked the decision. Plaintiff was notified of the meeting, but he did not receive a written statement of the grounds for his dismissal. The meeting was divided into two parts; during the first half, which was open to the public, former clients of plaintiff testified on his behalf. Thereafter, the balance of the meeting was conducted in private among plaintiff, Boyle, defendant Middlemiss, Costello and the five members of the Personnel Committee. The four attorneys were afforded full opportunity to present their "cases" to the Committee: plaintiff expressed his view as to why he was discharged and submitted exhibits in support

thereof; Boyle spoke on plaintiff's behalf; and defendant Middlemiss and Costello summarized their reasons for plaintiff's removal. At the conclusion of the hearing, the Personnel Committee, on the basis of the evidence presented, voted four to one to uphold the decision of defendant Middlemiss to dismiss plaintiff. Plaintiff was apprised of the Committee's affirmation the day of the hearing. On January 24, 1973, the Board of Directors of the Society reviewed plaintiff's dismissal and sustained the decision of the Personnel Committee. Plaintiff was neither informed of, nor present at, this meeting.

A barrage of oral and documentary evidence reflecting plaintiff's employment record, including the reasons for his termination, was presented at trial. A careful review of the record discloses that plaintiff was discharged for a manifest inability to function within the organizational framework of the

Society. The evidence amply demonstrates that plaintiff was unable to work with colleagues, to adhere to elementary rules and procedures of the Soceity and the District Court, and to exercise the degree of sound judgment that is necessary when presenting a case before the court. During the twelve month period of his employment at the District Court Bureau, plaintiff was unwilling to work as a member of a team but rather consistently performed according to his personal concept of his position. The incidents which culminated in plaintiff's dismissal might, when viewed singly, seem insignificant; however, when regarded in the aggregate, they unequivocally support the Society's contention that plaintiff's conduct impeded its proper functioning and reflected adversely on its good name. The summary below constitutes our findings of fact as to the reasons for plaintiff's discharge:

INABILITY TO WORK WITH COLLEAGUES

The friction between plaintiff and his coworkers was not the product of personality conflicts, but rather resulted from plaintiff's repeated interference with the clients of his fellow staff attorneys. These encroachments not only angered plaintiff's colleagues, but also hindered the smooth operations of the Society and the courthouse.

(a) The Mottenburg Incident

Without informing Mrs. Mottenburg, plaintiff took one of her client's files so he could discuss the case with the client. While advising her client outside the courtroom, the case was called, nobody answered, and a bench warrant was issued for the client's arrest. This incident led to a heated argument between plaintiff and Mrs. Mottenburg.

(b) The Kuzmier, Lardner and Elliott Incidents

After Mr. Kuzmier negotiated a disposition with the District Attorney and

obtained the consent of the client as well as the judge, the client subsequently refused to plead guilty to a violation. It seems that plaintiff, without the knowledge or consent of Mr. Kuzmier, interviewed the defendant and advised him not to plead guilty. Plaintiff similarly interfered with the clients of Mr. Lardner and Mr. Elliott; he advised or induced these defendants to withdraw their pleas without consulting assigned counsel.

ERRORS OF JUDGMENT

Plaintiff's overwhelming desire to protect and defend his assigned clients often led him to exercise poor judgment and to deviate from established standards of conduct. This weakness particularly emerged in his relations with the judges of the District Court.

(a) The Subpoena Incident

In February 1972, plaintiff was assigned to defend Lee Conyers. During the

trial, plaintiff orally applied for the production of certain police records for employment in cross-examination, but the presiding judge denied the request. After the court recessed for the day, plaintiff drafted a subpoena duces tecum for the production of these documents and, the next morning, asked Judge Angelo Mauceri, the Administrative Judge of the District Court, to sign the subpoena. Judge Mauceri declined. Plaintiff then presented the subpoena to Judge Orgera without disclosing that the same application had been denied. Judge Orgera refused to sign because of its overbroad scope. Plaintiff thereafter delivered the unsigned subpoena to Edward Elliott, a fellow staff attorney, and requested that he submit it to Judge Colinari, the judge before whom Mr. Elliott was presently appearing. Judge Colinari signed the subpoena. Again, plaintiff did not inform his colleague or Judge Colinari that both Judge Mauceri and

Judge Orgera had previously denied the application.

When Judge Mauceri discovered the procedure employed by plaintiff to obtain the subpoena, he summoned Boyle to his office and suggested that plaintiff should be transferred from the District Court Bureau. Boyle consulted with defendant Middlemiss and both agreed that a transfer of plaintiff would constitute a submission by the Society to the authority of the court in a matter which solely concerned the Society. Shortly thereafter, Judge Mauceri conducted a meeting with Boyle and plaintiff in his chambers. Judge Mauceri expressed the view that plaintiff had violated the Canons of Ethics by not apprising the judges of the prior submissions of the subpoena. However, Judge Mauceri stressed that his purpose was not to hinder plaintiff's proper representation of clients. He advised plaintiff that "(a)s far as your practice, I don't

want you to limit yourself or your ability to defend the clients the way you see fit. I don't intend to do that but you have to do it within the purview of the rules and regulations of Ethics. Every lawyer is bound by it, not only you but everyone, whether it be a private attorney or one working for the State as you are." (Plaintiff's Exhibit 15, p. 5).

(b) The McElhiney Affirmation

On September 27, 1972, plaintiff moved to dismiss for failure to prosecute People v. McElhiney, a misdemeanor prosecution that had been on the calendar on eight different occasions. Plaintiff filed an affirmation in support of the motion in which he stated that "(t)he sequence of events detailed above might lead an objective observer to conclude that the Court has functioned as an agent of the District Attorney, focusing on the convenience of the prosecution, ignoring the defendant's right to a speedy trial, and endeavoring to

to assure that a case which the People might lose on trial not be tried." (Plaintiff's Exhibit 1, p. 3). This accusation was obviously aimed at Judge Green who, earlier in the affirmation, was charged by plaintiff with speaking for the office of the District Attorney in offering an explanation for the prosecution's lack of readiness for trial. When Judge Green learned of the affirmation, he summoned plaintiff and Costello to his chambers and instructed plaintiff that, in the future, he should request his disqualification from any case in which plaintiff felt he was biased. Costello reported the incident to defendant Middlemiss.

(c) The Article 78 Proceeding against Judge Tisch

This episode involved a case which plaintiff was ready to try but was adjourned upon the request of the District Attorney. When Judge Tisch adjourned the case, he marked

the file "No Parts Available". Plaintiff believed that Judge Tisch's inaccurate description was intentional and attempted to bring an Article 78 proceeding to compel the proper notation for the adjournment. Plaintiff travelled to Riverhead to file the proceeding, but defendant Middlemiss interceded and instructed plaintiff not to pursue the matter. Plaintiff not only abandoned his assigned part in the District Court Bureau to file the proceeding, but he also brought it in the wrong court.

INABILITY TO FOLLOW ESTABLISHED RULES

(a) The Pen Incident

On October 12, 1972, plaintiff accompanied a client he was currently defending at trial to the courthouse holding pen. To enable the defendant to take notes for plaintiff's use at summation, plaintiff gave the defendant a ball point pen, notwithstanding previous oral admonishments by the security force personnel not to leave such instruments with detainees.

Upon discovery that plaintiff had provided the defendant with the pen, a member of the holding pen security force refused to allow plaintiff to enter the detention area and notified Judge Mauceri of the incident. Judge Mauceri issued an order barring plaintiff from the holding pen; telephoned defendant Middlemiss to inform him of his action; and subsequently sent a formal letter to defendant Middlemiss reciting his decision to bar plaintiff from the holding pen.

(b) The Volz Incident

Assistant District Attorney Volz discovered plaintiff rummaging through files in the Suffolk County District Attorney's Office, which was located in the District Court building, after 5:00 p.m. Volz reported the incident to his supervisor and the latter forbade plaintiff from entering the District Attorney's Office without accompaniment by an Assistant District Attorney.

(c) Lending of Minutes Without Permission

On several ovcasions, plaintiff, without the requisite approval, loaned minutes of Legal Aid cases which were ordered and paid for by the Society to outsiders.

ABSENCE FROM ASSIGNED PARTS

During the course of his employment with the Society, plaintiff evidenced a strong interest in police brutality cases. Plaintiff often accompanied these defendants to the Suffolk County Human Rights Commission and the Internal Affairs Bureau of the Suffolk County Police Department to assist them in filing formal complaints of police misconduct. Plaintiff also personally argued more writs of habeas corpus than any other staff attorney, which proceedings necessitated frequent trips to the County and Supreme Courts in Riverhead. Although the Society's philosophy was clearly not to restrict plaintiff from pursuing such cases, these pre-occupations disrupted the organization of the

Society and often shifted plaintiff's workload to the shoulders of his colleagues. For example, Edward Elliott, a staff attorney who was assigned to the arraignment part with plaintiff, was often forced to administer the duties single-handedly because of plaintiff's continuous disappearance. Plaintiff's absence was sorely felt since there were as many as 180 arraingments a day, of which fifty to sixty constituted prisoners who had been transported from the six precincts and from the county jail. It was necessary to interview each prisoner in order to decide whether he or she qualified for Legal Aid. Costello received almost daily complaints concerning plaintiff's absence from assigned parts, including his nonappearance in the court-room when cases were called. Plaintiff's presence in the arraignment part was so scarce in September 1972 that Costello was forced to reassign him to the identical part in October.

CONCLUSIONS OF LAW

Jurisdiction: Under Color of State Law

To state a cause of action under §1983, two elements must be proven. First, plaintiff must establish that defendants have acted ". . . under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory. . ." Or, expressed in its colloquial terms, plaintiff must demonstrate that defendants have acted "under color of state law."[4] Second, plaintiff must prove that

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/4 Similarly, plaintiff's claim under the first, sixth and fourteenth amendments requires a showing of state action. The due process clause of the foutteenth amendment provides:

"No State shall . . .deprive any person of life, liberty, or property, without due process of law. . ." (emphasis added).

The "under color of state law" requirement of §1983 is synonymous with the "state action" requirement of the fourteenth amendment. United States v. Price, 383 U.S.

defendants deprived him of a right, privilege or immunity secured by the Constitution and laws of the United States.

The Society is a membership corporation created and organized under Article 2 of the Membership Corporation Law of the State of New York. At all relevant times, it was under contract with the County of Suffolk to provide legal services to indigent criminal defendants in that county pursuant to Article 18-B, §722 of the County Law of New York (McKinney Supp. 1976-77), which requires each county to institute a scheme for providing counsel to indigent persons charged with a crime./5 The Criminal

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/4 Cont.

787, 794 n. 7, 86 S. Ct. 1152, 1157 (1966); Perez v. Sugarman, 499 F. 2d 761, 764 (2d Cir. 1974); Shirley v. State Nat. Bank of Connecticut, 493 F. 2d 739, 741 (2d Cir. 1974), cert. denied, 419 U.S. 1009, 95 S. Ct. 329 (1974).

/5 §722 of Article 18-B provides, in pertinent part:

Division of the Society is funded entirely by the Legislature of Suffolk County.

The Society is governed by a Board of Directors elected by its general membership.[6] At all relevant times, no member of the Board of Directors was a public official, nor

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[5] Cont.

> The governing body of each county. . . shall place in operation throughout the county. . .a plan for providing counsel to persons charged with a crime. . . who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:
>
> 1. Representation by a public defender....
>
> 2. (R)epresentation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operated to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel. . . .
>
> 3. Representation by counsel furnished pursuant to a plan of a bar association. . . .

does any public official become a member of the Society or its Board by virtue of his or her public office. Authority for the hiring and firing of attorneys is vested in the Attorney-in-Charge who, ". . .subject to the control and direction of the Board, shall be responsible for the the Society's legal work. . . and shall have charge and supervision of its offices and branches." (Society's By-Laws, Article VI, §6.1 (Defendant's Exhibit PP, p. 5)).

/5 Cont.

4. Representation according to a plan containing a combination of any of the foregoing. . . .

/6 Article IV of the Society's By-Laws provides that "(T)he management of the affairs, property, business and operations of the society is vested in a Board of Directors." (Defendant's Exhibit PP, p. 2).

Memorandum of Decision and Order

The history, constitution and by-laws, and organization of the Society unquestionably establish its status as a private institution. Plaintiff, however, does not dispute the fact that the Society is fundamentally a private entity. Rather, plaintiff asserts two theories commonly applied to private institutions which, he argues, conclusively demonstrate that the Society acted under color of state law: first, that a private entity may act under color of state law by conspiring with state officials to perform an unconstitutional act, Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S. Ct. 1598 (1970); United States v. Price, 383 U.S. 787. 86 S. Ct. 1152 (1966) and second, that the state and its officers have so extensively involved themselves in the administration of the Society as to render the conduct of the Society state action., Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856 (1961).

Defendants, on the other hand, contend that Lefcourt v. The Legal Aid Society, 445 F. 2d 1150 (2d Cir. 1971) is dispositive of the state action issue; that there is no substantial state involvement with the Society; and that, in any event, there was no connection between the state activity and the alleged wrongful discharge of plaintiff.

Plaintiff's first theory of state action, based on the doctrine enunciated by the Adickes and Price decisions, must fail. Those cases stand for the proposition that private persons are liable under §1983 where it is shown that they conspired with state officials to deprive a person of federal rights:

> Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. Adickes v. S.H. Kress and Company, supra at 152, 90 S. Ct. 1605-6, quoting United States v. Price, supra at 794, 86 S. Ct. 1157

Fundamental to this principle of state action is the involvement of the state official in the proscribed activity; it is his conduct which provides the state action necessary to establish a §1983 claim. Adickes, supra at 152, 90 S. Ct. 1605. Where no cause of action is stated against the government official, the claim against the private person fails as well. Thus, it is well settled that where the state official is immune from suit, private persons cannot be held liable under §1983 because they did not act in conspiracy with a state official against whom a valid claim could be stated. Consequently, the alleged wrongful action was not done under color of state law. Sykes v. State of California Dept. of Motor Vehicles, 497 F. 2d 197, 202 (9th Cir. 1974); Bergman v. Stein, 404 F. Supp. 287, 296 n. 9 (S.D.N.Y. 1975); Stambler v. Dillon, 302 F. Supp. 1250 (S.D. N.Y. 1969).

In the instant case, plaintiff relies upon the actions of judicial defendants Mauceri and Green to satisfy the requirement of state participation in the prohibited act. However, such reliance is unwarranted since Judge Mauceri and Judge Green did not partake in the decision to discharge plaintiff. In dismissing the complaint against these defendants, Judge Weinstein noted the lack of evidence to support plaintiff's contention that these judges sought, or even desired, plaintiff's dismissal:

> No claim ... has been made out sufficient on constitutional grounds to support any judgment against these two judges. All the evidence shows (is) that they complained to Legal Aid about aspects of this plaintiff's work that they didn't care for. In each case the complaint was arguably a justifiable complaint.
>
> It's the duty of judges to observe lawyers before them, bring to the lawyers' attention defects that they see in their work and where they see, to bring it to the attention of the lawyers or if they are lawyers, to the Bar Association or others.

> There isn't the slightest direct evidence that these judges asked for the resignation or firing of this plaintiff or that they desired it. I don't see how there's any basis for liability here in the judges. I don't even reach the question of whether they have a valid defense on the ground that this is part of their judicial duties, just as treating them as normal civilians without consideration for their judicial capacity.
>
> There simply has been no case made out. The only thing we have is the hearsay and surmise of the plaintiff, which certainly doesn't suffice. (Weinstein Transcript, 11/26/76, pp. 267-8).

Hence, the absence of the judges' participation in the alleged unconstitutional act -- the wrongful termination of plaintiff -- is fatal to the claim of state action under the Adickes and Price conspiracy doctrine. Plaintiff has failed to establish a valid claim against the state officials and thereby satisfy the color of state law requirement./7

Plaintiff's second theory of state

/7 As noted previously, where the state official is shielded by immunity, the claim against the private person is defeated.

action, based upon the proposition that "(c)onduct that is formally private may become so entwined with government policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 488 (1966), is also deficient. It should be noted at the outset that, under this principle,". . . the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action" on the other hand, frequently admits of no easy answer. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S. Ct. 1965, 1971 (1972).

/7 Cont.

Here, the case is an even stronger one since Judge Weinstein dismissed the complaint against the judicial defendants on the merits.

It is "(o)nly by sifting facts and weighing circumstances (that) the nonobvious involvement of the State in private conduct can be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961).

Instrumental to a finding of state action under this doctrine is what is commonly referred to as the "nexus requirement": the state must be involved with the activity that caused the injury. This prerequisite was expressed by the court in Powe v. Miles, 407 F. 2d 73, 81 (2d Cir. 1968):

> (T)he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.

Accord, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974); Moose Lodge No. 107, supra, at 173, 92 S. Ct.

1971; Weise v. Syracuse University, 522 F. 2d 397, 405 (2d Cir. 1975).

Plaintiff sets forth the following factors to establish state action: the Criminal Division of the Society receives its funding exclusively from governmental sources; the Society serves a public function by fulfilling the state's constitutional obligation to provide counsel to indigent persons accused of a crime; and, defendant Mauceri, in his capacity as administrative judge of the District Court, assisted the Society in securing funding,[8] in obtaining the services of a Spanish interpreter, and in decreasing its workload by adjusting the court's assignment policy. These factors share the common fatality of bearing no relationship to the termination of plaintiff. Consequently, the absence of the required

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[8] In discussing the budget for the District Court during his annual address before the County Legislature in 1971, Judge Mauceri requested funds for the Society.

"nexus" between the state's involvement and the challenged act negates a finding of state action.

It is well established that the mere receipt of money from the state, without a nexus between the funding and the activity under attack, is insufficient to deem the recipient an agent or instrumentality of the state. Weise, supra at 405; Barrett v. United Hospital, 376 F. Supp. 791, 801-2 (S.D.N.Y. 1974), aff'd, 506 F. 2d 1395 (2d Cir. 1974); Grossner v. Trustees of Columbia University in the City of New York, 287 F. Supp. 535 (S.D.N.Y. 1968). In Lefcourt v. Legal Aid Society, supra, the Court of Appeals for the Second Circuit held that the dismissal of an attorney by his employer, the Legal Aid Society of the City of New York, did not constitute action taken under color of state law. The court concluded that the receipt of government funds by the Society was not decisive of the

state action issue because Lefcourt failed to demonstrate that the government controlled the Society's employment practices:

> Lefcourt has failed to establish that the City or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise Thus, ... it cannot be said that the Society acts under color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs (footnote omitted). Id. at 1155.

The argument that the Society's conduct constitutes state action because of the public function which the Society fulfills in providing counsel for indigent criminal defendants as mandated by the sixth amendment was also rejected in the Lefcourt decision. The court noted that the representation of persons accused of crimes is traditionally performed by private individuals and hence does not

constitute an essential state function:

> Activities which are constitutionally essential to the functioning of the judicial process, including the representation of indigent persons accused of criminal activity, are doubtlessly among the most significant functions that any agency, public or private, might be called on to perform. However, the representation of persons accused of crimes, far from being the function of any agency which "traditionally serves the community" is normally performed for and by private persons. . . . The City has sought to have the Society function under similar circumstances. Under the contract, the City retains few controls over the Society, and the Society's obligation under the contract is to its clients and not to the City. Id. at 1156.

Nor were the acts of judicial defendants Mauceri and Green so related to the discharge of plaintiff as to render the conduct of the Society state action. As noted earlier, Judge Weinstein found that neither Judge Mauceri nor Judge Green dictated or requested the termination of plaintiff. Rather, as indicated above, their participation was chiefly confined to criticizing plaintiff for his errors of judgment and his misdeeds, and to reporting

these incidents to his superiors. Although Judge Mauceri suggested in February 1972 that plaintiff should be transferred, see pp. 9-10 infra, both Boyle and Middlemiss refused to do so. The record reveals that the only substantial connection between the actions of the judicial defendants and plaintiff's discharge was Judge Mauceri's decision to bar plaintiff from the courthouse holding pen. Defendant Middlemiss acknowledged that one of the reasons for plaintiff's removal was that his utility to the Society was diminished by his exclusion from this area.

Certainly, the presence of one link connecting the state activity with the decision to discharge plaintiff is insufficient under the facts of this case to render the Society's conduct attributable to the State. The evidence amply demonstrates that the decision to dismiss plaintiff resulted from the independent determination of the Society and

and was grounded upon plaintiff's entire course of conduct during the twelve month period of his employment at the District Court Bureau. Plainly stated, the facts of this case do not warrant the finding that ". . . the state action, not the private action, (is). . .the subject of the complaint." Powe v. Miles, supra at 81.[9]

The absence of state action renders it unnecessary to treat plaintiff's claim

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/9 Had plaintiff's claim been one of racial discrimination, the state-private relationship might have triggered a finding of state action. The Second Circuit has traditionally applied different standards of state action to §1983 claims, depending on the offensiveness of the alleged misconduct and the constitutional guarantee in dispute. This principle was recently reaffirmed in Weise, supra at 405:

> We must. . .look to the nature of the right infringed as well as the extent of the state's involvement. . . . In both Grafton v. Brooklyn Law School and Powe v. Miles, we explicitly noted that our findings of no state action might be different if the cases involved discriminatory

that the procedural aspects of his dismissal violated the due process clause of the fourteenth amendment.

DEPRIVATION OF CONSTITUTIONAL RIGHTS

Even assuming arguendo that the jurisdictional requisite of action taken under color of state law is present, plaintiff has failed to establish a case on the merits.

/9 Cont.

> admissions policies. Moreover, we have recognized the existence of a "double standard" in state action - "one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims," Jackson v. The Statler Foundation. . . .(citations and footnote omitted).

Plaintiff focuses upon three episodes to support the claim that his dismissal was predicated on the exercise of constitutionality protected activity: the McElhiney Affirmation; the subpoena incident; and the pen incident. Each of these events involved plaintiff's role as an advocate of the rights of his clients. The purpose of the subpoena was to obtain records for cross-examination of witnesses who testified against his client; the purpose of the motion to dismiss the McElhiney case for failure to prosecute was to vindicate the right of his client to a speedy trial; and the purpose of providing his client with a pen was to enable the latter to communicate with his attorney and with the court. Therefore, plaintiff argues, by basing his dismissal on these three incidents, plaintiff was unconstitutionally punished for exercising his right of free speech and for exercising the rights of his clients to a fair trial and to adequate legal representation.

It is well settled that the termination of a public employee may not be grounded upon the exercise of constitutionally protected activity. The Supreme Court reaffirmed this established principle in Perry et al. v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Speiser v. Randall... Such interference with constitutional rights is impermissible. (citations omitted).

Therefore, the primary issue a court must resolve when faced with a claim of unconstitutional dismissal of a public employee

is whether the termination was based upon conduct that is protected by the Constitution. Perry, supra at 598, 92 S. Ct. 2698. Or, to phrase it in other terms: was the employee discharged for the assigned reasons or did the real motive involve constitutionally protected activity? Shaw v. Board of Trustees of the Frederick Community Hospital, 549 F. 2d 929, 933 (4th Cir. 1976); Hetrick v. Martin, 480 F, 2d 705, 707 (6th Cir. 1973), cert. denied, 414 U.S. 1075, 94 S. Ct. 592 (1973). In order to prevail, the employee must prove that the decision to dismiss was, in fact, made in retaliation for the exercise of his constitutional rights. When a plaintiff has been given full opportunity to establish that the discharge was a reprisal, and he fails in his proof, the discharge must stand. Calo v. Paine, 521 F. 2d 411, 413 (2d Cir. 1975).

This court is convinced that plaintiff's termination was in no manner based

upon the exercise of his first amendment right of free speech or upon the assertion of the sixth amendment rights of his clients. Plaintiff offers no proof that the Society's actions were motivated by a desire to impede or interfere with his representative duties. At no time during his employment was plaintiff ever instructed how to try a lawsuit or how to defend an indigent client whom he was assigned to represent. Nor was plaintiff ever restricted by his supervisors in the execution of his duty to represent an indigent criminal defendant within the bounds of the law.

Plaintiff's claim, though theoretically correct, is unsupported by the evidence. A study of the record reveals that the decision to discharge plaintiff was not made because he was attempting to obtain evidence useful in cross-examination, or seeking to vindicate his client's right to a speedy trial, or attempting to communicate with a client.

Rather, these episodes played a part in the decision to terminate plaintiff because they demonstrated his inability to adhere to elementary rules and procedures of the Society and the court. These occurrences, together with many others, compel the finding that plaintiff was removed for his failure to function within the organizational framework of the Society.

Lefcourt v. The Legal Aid Society, 312 F. Supp. 1105 (S.D.N.Y. 1970), aff'd, supra, factually similar to the instant case, is particularly noteworthy. There, a former Legal Aid attorney, Gerald B. Lefcourt, brought an action against the Society under 42 U.S.C. §1983, claiming that his termination was based solely on the exercise of his first amendment rights. Plaintiff contended that he was discharged because of critical statements he had made to fellow attorneys about the Society and because of his role in the

organization of "The Association of Legal Aid Attorneys." As in the case at bar, the court found that the alleged unconstitutional conduct constituted only one piece of a large puzzle -- the Lefcourt record revealed a history of frictional episodes between Lefcourt and his superiors as well as a failure by Lefcourt to follow the Society's instructions. The court was convinced by the evidence that Lefcourt was not discharged solely for the exercise of his first amendment rights but, like plaintiff herein, was dismissed because his services were not in harmony with the welfare of the Society:

> Without questioning the good faith of Lefcourt's efforts to achieve the crucial and important objective of improving the quality of defense of indigents in the courts in which he worked, I find that the Society, also acting in good faith and with equal zeal for the welfare of its clients, discharged plaintiff lawfully. In reaching this determination I have concluded that Lefcourt was discharged as the result of an amalgam of acts of which his statements constituted a

> part, but only a part, and that his total behavior during the course of his employment with the Society was such as to permit the Society to decide in good faith that his service was not in harmony with the welfare of the organization. (footnotes omitted). Lefcourt v. Legal Aid Society et al., 312 F. Supp. 1107.

Plaintiff's reliance on Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731 (1968), is misplaced. In fact, Pickering stands for the proposition that in certain circumstances -- which are present in the instant case --- the exercise of constitutional rights may be considered in the termination of employment. In Pickering, a teacher was dismissed for writing and publishing a letter which criticized the School Board's treatment of proposals to raise new revenue for the schools. Illinois courts affirmed Pickering's discharge, but the Supreme Court reversed, holding that the dismissal violated Pickering's first amendment right to free speech. The

Court refused to adopt a hard and fast rule that public statements by employees may never furnish the grounds for their termination:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. at 568, 88 S. Ct. 1734 5.

In the course of its opinion, the Court delineated the countervailing interests of the state which, if sufficiently strong, may provide the basis for the dismissal of the employee. For example, where the statements threaten to disrupt harmony among coworkers, to impede the proper performance of the employee's duties, or to interfere with the systematic and orderly operation of the schools, the employee's first amendment rights may be outweighed by

the interest of the State". . .in promoting the efficiency of the public services it performs through its employees." Id. at 568, 88 S. Ct. 1735.

These factors are unquestionably present in the case at bar. It has previously been shown how plaintiff's conduct interfered with the orderly operation of the Society and impeded the proper performance of plaintiff's duties. Thus, even if his removal were based in part on the exercise of free speech, or the assertion of his clients' sixth amendment rights, such reliance by the Society would be permissible. The Court's elucidation in Chitwood v. Feaster, 468 F. 2d 359, 361 (4th Cir. 1972) of when a teacher's statements cannot shield him from dismissal is particularly apposite to plaintiff's actions:

> A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the Department. If one cannot or does not, if one undertakes

> to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

See also Sprague v. Fitzpatrick, 546 F. 2d 560 (3rd Cir. 1976) (Court applied Pickering to sustain the discharge of a First Assistant District Attorney who had accused his superior of not telling the truth); Lefcourt v. The Legal Aid Society, 312 F. Supp. 1111-14 (Court applied Pickering and held that statements by a Legal Aid attorney could form the basis of his dismissal since they had a definite impact on the internal operation of the Society and threatened to disrupt harmony among coworkers).

Plaintiff's claim that he was denied due process because the reasons proferred by defendants for his dismissal were arbitrary and irrational lacks merit. The evidence more than adequately supports defendants'

contention that plaintiff's termination was based upon his inability to adhere to organizational procedures and to develop amiable working reltionships with his colleagues. In Simard v. Board of Education of the Town of Groton, 473 F. 2d 988 (2d Cir. 1973), the court rejected a similar claim by a nontenured teacher whose one year contract was not renewed by the Superintendent of Schools. The Board of Education conducted a hearing to review the Superintendent's decision and, having found that Simard's infractions of the rules and regulations were not conducive to an effective administration of the school system, upheld the dismissal. Simard contended that the reasons proferred for the nonrenewal of his contract were unrelated to the legitimate educational interests of the school and hence denied him due process of law. The court rejected plaintiff's claim and held that the infractions ".. .are not so minimally related

to the effective performance of a high school teacher as to be unconstitutionally capricious or arbitrary . . . . A school system may justifiably demand more from its teachers than competent classroom instruction; a chronic refusal to comply with reasonable administrative obligations can surely have a disruptive effect on students, fellow teachers and administrators alike. . . ." Id. at 994-5. As in Simard, plaintiff's infractions of the regulations of the Society and his inability to work with colleagues were not so unrelated to the interests of the Society as to be capricious or irrational.

CLAIM OF RESERVE INSURANCE COMPANY

Plaintiff Reserve Insurance Company ("Reserve") seeks a declaratory judgment stating that it is not contractually bound to defend or indemnify the Society, the defendant Middlemiss or defendant Ralph Costello in the consolidated action decided

above. Since Graseck has failed to establish a cause of action, the only issue to be resolved is Reserve's obligation to defend. It is the position of Reserve that ". . .the acts complained of in Graseck are not covered under Reserve's policy of liability insurance issued to the National Legal Aid and Defender Association (with subcertificate to Legal Aid Society of Suffolk County, Inc.)" (Reserve Trial Memorandum, p. 1). More specifically, Reserve argues that the policy insures the Society and its members against legal malpractice actions brought by its clients, and not claims, such as Graseck's, which emanate from the termination of an employer-employee relationship.
A plain and reasonable reading of the insurance contract, which is unambiguous in its terms, convinces this court that Graseck's action does not fall within the coverage of the policy.

The policy states in pertinent part that:

> This Insurance is to indemnify. . . any claim or claims for breach of professional duty as lawyers which may be made against them. . . by reason of any negligent act, error, or omission. . . in their professional capacity as lawyers acting as legal aid or defenders as defined in Article I of the Bylaws of the National Legal Aid and Defender Association. (emphasis added). (Exhibit A to Reserve's Trial Memorandum, p. 1).

Section 1.2 and 1.3 of Article I of the Society's By-Laws define "legal aid" and "defender" as follows:

> 1.2 The terms "legal aid". . . mean the rendering of legal services in civil matters to persons unable to employ counsel for lack of means, either in the nature of consultation and advice or in the nature of representation in court . . . .
>
> 1.3 The terms defender. . . mean the rendering of legal services to persons unable to employ counsel for lack of means who are accused of a crime, either in the nature of consultation and advice or in the nature of representation in court.... (Exhibit C to Reserve's Trial Memorandum, p. 5).

Thus, the language of the contract and the terms of the By-Laws which it incorporates

clearly indicate that the claim must be one for misfeasance or nonfeasance in the rendering of legal services to indigent clients.

The obligation of an insurance company to defend an action brought against the insured by a third party is determined by the allegations of the complaint: if the complaint upon its face alleges facts which fall within the coverage of the policy, the insurer is obligated to assume the defense of the action. Rochester Woodcraft Shop, Inc. v. General Accident Fire and Life Assurance Corp., Ltd., 35 App. Div. 2d 186, 187, 316 N.Y.S. 2d 281, 283 (Fourth Dept. 1970); Gallivan v. Pucello, 68 Misc. 2d 713, 715, 328 N.Y.S. 2d 37, 40 (Sup. Ct. Onondaga County, 1971), aff'd, 40 App. Div. 2d 749, 338 N.Y.S. 2d 411 (Fourth Dept. 1972). The gravamen of Graseck's complaint is that his dismissal was unconstitutionally predicated on the exercise of his first amendment right and the

sixth amendment rights of his clients. The complaint does not contain factual allegations that the Society, defendant Middlemiss or defendant Costello were negligent while rendering services to indigent clients. The averments that defendants dismissed him (Graseck) "for properly performing his duties as an attorney and specifically asserting his clients' constitutionally protected rights... " and that "by establishing. . .a pattern of judicial interference. . .(defendants) intended to discriminate against. . .plaintiff . . . in prejudice of. . . the rights of indigents represented by Suffolk Legal Aid", (Plaintiff's Complaint dated August 7, 1974, pars. 33, 38), do not, as defendants contend, transform the action into one arising out of the negligent representation of clients. Since Graseck's claim is not embraced by the terms of the policy, Reserve had no obligation to defend the Society, defendant Middlemiss

and defendant Costello.

CONCLUSION

For the reasons cited above, the complaint in Graseck v. Mauceri (74-C-1157) is dismissed and judgment is granted for defendants Legal Aid Society of Suffolk County, New York and John F. Middlemiss, Jr. In Reserve Company v. Mauceri (74-C-1559), plaintiff is entitled to a declaratory judgment that it is not contractually bound to defend or indemnify the Legal Aid Society of Suffolk County, New York, John F. Middlemiss, Jr. and Ralph Costello.

The Clerk of the Court is directed to enter judgment in accordance with this memorandum of decision and order.

/s/ Jacob Mishler
U. S. D. J.

App. C1(a)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight

Present:

HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES
Circuit Judges

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ARTHUR V. GRASECK, JR.,
Plaintiff-Appellant,

v.

ANGELO MAUCERI, individually and as Administrative Judge of the District Court of Suffolk County; EDWARD U. GREEN, JR., individually and as Judge of the District Court of Suffolk County; JOHN F. MIDDLEMISS,JR., individually and as Attorney-in-Charge, LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK; RALPH COSTELLO, individually and as Attorney-in-Charge of the Criminal Division of the Legal Aid Society of Suffolk County, New York; LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK;

77-7572

Defendants-Appellees.

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Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By /s/ Sara Piovia
Deputy Clerk